United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

NO. 75-4099

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 75-4099

AMERICAN CAN COMPANY, *Petitioner,*

and

UNITED STEELWORKERS OF AMERICA, AFL-CIO, *Intervenor,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

No. 75-4126

LOCAL ONE, AMALGAMATED LITHOGRAPHERS OF AMERICA, INTERNATIONAL TYPOGRAPHICAL UNION, AFL-CIO, *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

On Petitions for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

COUNTERSTATEMENT OF ISSUES PRESENTED

1. Whether substantial evidence on the record as a whole supports the Board's findings that the Company violated Section 8(a)(1), (2), and (3) of the Act by recognizing the Steelworkers as the exclusive bargaining representative of the lithographic production employees at the Regency plant,

and maintaining and enforcing as to those employees a contract containing a union-security provision, while a real question concerning the representation of those employees existed.

2. Whether substantial evidence on the record as a whole supports the Board's findings that the Company did not violate Section 8(a)(5) and (1) of the Act.

COUNTERSTATEMENT OF THE CASES

These cases, which were consolidated by order of this Court, are before the Court on the petitions of American Can Company (hereinafter "the Company")[1] and Local One, Amalgamated Lithographers of America, International Typographical Union, AFL-CIO (hereinafter "the ALA") to review an order of the National Labor Relations Board,[2] and on the Board's cross-application for enforcement of its order. The Board's Decision and Order, issued on May 30, 1975, are reported at 218 NLRB No. 17 (A. 1a-15a).[3] This Court has jurisdiction under Section 10(e) and (f) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*) (herein "the Act"), since the Company's principal office is at Greenwich, Connecticut.

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[1] On June 11, 1975, this Court granted the motion of United Steelworkers of America, AFL-CIO (hereinafter "the Steelworkers") to intervene in No. 75-4099 (the Company's petition for review). Thereafter, on July 14, 1975, the Court granted the Board's motion to consolidate No. 75-4099 and No. 75-4126.

[2] The order was issued by a panel of Members Jenkins, Kennedy, and Penello.

[3] "A." references are to the printed appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

I. THE BOARD'S FINDINGS OF FACT

For many years, the Company operated a plant in Jersey City, New Jersey (herein called the Hudson plant), consisting of eight 8-story buildings, with more than a million square feet of floor space (A. 18a; 205a-206a). A wide variety of metal containers was produced at this plant (A. 20a; 206a-207a). At peak production, more than a billion containers a year were produced, and approximately 66 lithographic production employees were employed (A. 206a-209a). By early 1973, only 44 lithographic production employees remained; a total of about 1800 employees were then employed at the Hudson plant (A. 18a; 209a, 212a). The lithographers had been represented by the ALA since 1944, while the production and maintenance employees were represented by the Steelworkers, and three other unions represented smaller groups of employees (A. 18a; 91a, 286a-287a).

On August 8, 1972, the Company notified its employees that the Hudson plant, along with eight of the Company's other plants, would be shut down within 18 months (A. 18a; 350a). On December 20, 1972, it notified the employees that a new can manufacturing facility (hereinafter called the Regency plant) would be opened in Edison Township, New Jersey, and would eventually employ approximately 250 people, that all manufacturing operations at the Hudson plant would cease by August 31, 1973, and that any employees interested in employment at the Regency plant should apply at the Employee Relations Department at the Hudson plant (A. 18a; 340a). Ultimately, 216 employees from the Hudson plant were offered employment at the Regency plant, but only 95 accepted (A. 18a; 182-183a).

The Company did not directly notify the ALA of the impending shutdown. However, the ALA's steward at the Hudson plant informed Hansen, executive vice-president of the ALA, of the December 20 notice

and said that most of the lithographic employees had expressed an interest in employment at the Regency plant. On January 16, 1973, Hansen called Leser, the Company's industrial relations representative, and said that the ALA was concerned about its members' loss of jobs due to the forthcoming shutdown of the Hudson plant. He also asked whether the Company was considering having the ALA contract carry over to the Regency plant. Leser replied that the Company considered the Regency plant a new plant and would prefer that it be unorganized, but if it were organized, the Company would prefer that all employees be included in a single unit (A. 3a; 92a-93a).

On January 19, Hansen wrote the Company saying that an overwhelming majority of the employees represented by the ALA at the Hudson plant had expressed a desire to work at the Regency plant and to continue to be represented by the ALA, and that, accordingly, the ALA expected recognition as bargaining representative of the lithographic employees at the Regency plant (A. 18a-19a; 331a). A few days later, the ALA's steward gave Plant Manager Larry Marifjeren a petition, signed by all the employees represented by the ALA in the Hudson plant, saying that they desired to work at the Regency plant and to continue to be represented by the ALA (A. 3a, 19a; 140a-141a, 339a). Marifjeren turned both the letter and the petition over to Ries, the general supervisor of employee relations at the Hudson plant (A. 19a; 180a).

On January 30, the Company replied to Hansen's letter, reiterating its contention that the Regency plant would be an entirely new operation, rather than a relocation of the Hudson plant and that the ALA's contract at the Hudson plant would not, therefore, apply to the Regency plant (A. 19a; 332a). On March 7, Hansen replied, by letter, that the Company had violated its bargaining obligations to the ALA by not bargaining about the closing of the Hudson plant and the move to Edison, which directly

and drastically affected employees represented by the ALA; that the Regency plant was not an entirely new operation, since the same lithographic skills would be utilized on substantially the same lithographic equipment as at the Hudson plant; that any lithographic employees from the Hudson plant who desired employment at the Regency plant should be transferred there; and that the ALA desired to negotiate a new contract to replace the one expiring on May 1 (A. 19a; 333a-334a).[4]

On March 9, the Company replied that it had no duty to bargain about a decision to close the Hudson plant or open a new plant; that it had satisfied, for the duration of the existing contract, its obligation to bargain about the effects of the closing of the Hudson plant on the employees represented by the ALA, but would bargain with the ALA for a new contract covering, *inter alia*, the Hudson plant; that the ALA had not established its right to represent any employees at the Regency plant; and that the Company would consider any applicant for employment at the Regency plant on a nondiscriminatory basis, but would not automatically hire any employee represented by the ALA at the Hudson plant who desired employment at the Regency plant (A. 19a; 335a).

In April, the Company and the ALA held two meetings and negotiated a new contract for the Hudson plant and the other two existing plants nearby (see fn. 4, *supra*). The Regency plant was not discussed during these negotiations, and the new contract contained no provisions concerning the closing of the Hudson plant or employment of lithographic employees at the Regency plant (A. 19a-20a; 101a-102a, 290a). However,

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[4] This contract, and the one subsequently negotiated, applied to lithographers not only at the Hudson plant, but also at the Company's plants in Hillside and Hoboken, New Jersey (A. 18a; 101a-102a, 336a).

Hansen asked that a meeting be arranged between him and Buly, head of industrial relations for the Company on the East Coast. A meeting was arranged in early May, and Hansen asked Buly whether the Company had changed its position concerning the closing of the Hudson plant, employment of lithographers from that plant at the Regency plant, and representation of lithographic employees at the Regency plant by the ALA. Buly said that the Company had not changed its position; it still felt that the Regency plant was a new plant, and preferred that it be unorganized, but if it was organized, the Company preferred that there be one bargaining unit represented by one union (A. 20a; 101a-103a). There was no further direct contact between the ALA and the Company on these matters until March 4, 1974 (A. 20a, 23a; 105a).

The Hudson plant was not closed on schedule; as of the time of the hearing, 24 lithographic employees were still employed there, with complete shutdown expected in late July 1974 (A. 5a; 178a, 351a). Meanwhile, on July 7, 1973, the Regency plant opened. It was located about 26 miles from the Hudson plant (A. 3a; 63a) and consisted of one one-story building with about 263,000 square feet of floor space (A. 206a). Only aerosol cans were manufactured at the Regency plant; aerosol cans and many other kinds of containers had been produced at the Hudson plant (A. 20a; 186a, 207a-208a). All the lithographic equipment used at the Regency plant came from the Hudson plant, but other kinds of equipment came to the Regency plant from other plants, and some new equipment was purchased (A. 20a; 174a, 256a-257a). Some of the lithographic equipment from the Hudson plant was either scrapped or transferred to plants other than the Regency plant, including the Hillside plant, about ten miles away (A. 212a); new lithographic employees were hired at Hillside to do this work (A. 20a; 261a-262a, 212a). All the lithographic supervisors at the Regency plant came from the Hudson plant, but many

supervisors from the Hudson plant were transferred elsewhere (A. 21a; 175a, 353a-355a). Whereas the Hudson plant had had 1800 employees in more than 600 job classifications (A. 21a; 212a, 263a), it was anticipated that the Regency plant would ultimately employ 255 employees in 26 job classifications (A. 21a; 258a); at the time of the hearing (May, 1974), slightly more than 200 employees, including seven lithographic employees, were employed at the Regency plant (A. 5a, 21a; 176a-177a, 258a).

On August 23, 1973, the Steelworkers filed a petition for an election in a unit of "all production and maintenance employees including lithographers" at the Regency plant (A. 3a; 342a). At that time 64 of the expected 250 employees were employed in 16 of the expected 26 job classifications at that plant, but no lithographic employees were employed (A. 3a; 177a, 258a, 342a). On September 10, a Stipulation for Certification upon Consent Election, which had been executed by the Company and the Steelworkers, was approved by the Board's Regional Director, and an election was scheduled for September 21 in a unit of "all hourly rate production and maintenance employees" at the Regency plant. The unit description in the stipulation did not mention lithographers (A. 4a; 347a). The Board was not informed of the ALA's interest in representing lithographers at the Regency plant, nor was the ALA informed of the forthcoming election (A. 3a-4a; 192a-193a, 219a).

A few days before the September 21 election, an employee represented by the Steelworkers informed the ALA steward at the Hudson plant that there was to be an election at the Regency plant. This was confirmed by Ries, general supervisor of employee relations at the Regency plant (A. 21a; 272a, 311a). The steward notified the ALA's Director of Organizing, who, on September 20, had a letter delivered by hand to the

Board's Regional Office. The letter stated that the ALA had an interest in representing lithographic employees at the Regency plant and objected to their inclusion in a plant-wide unit (A. 4a, 21a; 341a). A Board agent then called Ries and asked whether he knew of any interest the ALA had in the election. Although Ries was aware that the ALA had requested recognition as representative of the lithographic employees at the Regency plant and employment there of lithographers from the Hudson plant, he said that he knew of no interest on the part of the ALA (A. 4a, 22a; 279a-282a). The election was held as scheduled the next day; the Steelworkers won by a vote of 84 to 0. The ALA was not on the ballot, and no lithographers voted, since none had yet been employed at the Regency plant (A. 4a; 329-330a). On September 28, the ALA filed charges with the Board, alleging that the Company had unlawfully refused to bargain with the ALA at both the Hudson plant and the Regency plant and had unlawfully assisted the Steelworkers at the Regency plant (A. 22a; 317a).

On October 1, the Regional Director certified the Steelworkers as bargaining representative of the production and maintenance employees at the Regency plant (A. 4a; 348a). Thereafter, the Company and the Steelworkers applied their national agreement to the Regency plant (A. 4a; 349a). This contract contained union-security provisions requiring employees to become and remain members of the Steelworkers (A. 22a; 356a).

On October 12, Plant Manager Marifjeren and Employee Relations Supervisor Ries interviewed five lithographic employees at the Hudson plant and offered them employment at the Regency plant, but stated that they would have to join the Steelworkers and accept the wage rates and benefits provided in the Steelworkers' contract, which were less advantageous than those in the ALA contract. A few days later, the five employees declined to accept employment at the Regency plant unless they

could work under the ALA contract (A. 4a, 23a; 113a-117a, 125a-128a, 145a-148a, 227a-235a). The Company made no further offers of employment to lithographers from the Hudson plant, and began hiring new lithographic employees at the Regency plant in December. The Company had hired four lithographers as of March 1974, and seven as of the time of the hearing in May 1974 (A. 5a, 23a; 176a-177a, 181a).

On March 4, 1974, the ALA wrote the Company, reiterating its contention that its contract covered lithographic employees at the Regency plant as well as those at the Hudson plant, and requesting recognition as the bargaining representative of the four lithographers then employed at the Regency plant (A. 23a; 338a). The following day, the ALA withdrew the 8(a)(5) allegations in the charge which it had previously filed, and filed a new charge, alleging that the Company had violated Section 8(a)(5) and (1) of the Act by refusing to recognize it as the bargaining representative of lithographic employees at the Regency plant, and had violated Section 8(a)(3) and (1) of the Act by refusing to hire lithographers at that plant unless they joined the Steelworkers (A. 23a; 318a).

On May 21, 1974, 8 days before the hearing herein opened, the ALA wrote the Company and, for the first time, specifically requested bargaining with respect to the effects of the phasing out of operations at the Hudson plant on the remaining lithographic employees there (A. 24a; 351a). On May 24, the Company responded that the phase-out was imminent, although the exact date thereof had not been announced, and that the Company was, and always had been, willing to discuss the effects of the phase-out with the ALA at a mutually convenient time (A. 24a; 352a).

II. THE BOARD'S CONCLUSIONS AND ORDER

On the basis of the foregoing facts, the Board found, in agreement with the Administrative Law Judge, that the Regency plant was a new plant rather than a relocation of the Hudson plant, and that the Company did not, therefore, violate Section 8(a)(5) and (1) of the Act by refusing to recognize the ALA as bargaining representative of the lithographic employees at the Regency plant (A. 2a, 32a-33a). The Board further found, in agreement with the Administrative Law Judge, that the Company had not unlawfully refused to bargain with the ALA concerning the effects of the closing of the Hudson plant on the lithographic employees there (A. 2a, 33a-35a). However, the Board found, contrary to the Administrative Law Judge, that a real question concerning representation existed with respect to the lithographic employees at the Regency plant when the Company recognized the Steelworkers as the bargaining representative of such employees and that, accordingly, the Company violated Section 8(a)(2) and (1) of the Act by such recognition, and violated Section 8(a)(1), (2), and (3) of the Act by applying the union-security clause of its contract with the Steelworkers to lithographic employees (A. 2a-8a).

The Board's order requires the Company to cease and desist from the the unfair labor practices found and from "in any like or related manner" interfering with, restraining, or coercing employees in the exercise of their Section 7 rights. Affirmatively, the Company is ordered to withdraw and withhold recognition from the Steelworkers as bargaining representative of the lithographic employees at the Regency plant until and unless it is certified by the Board; to reimburse all present and former lithographic employees at the Regency plant for all initiation fees, dues, and other moneys paid by or withheld from them under the union-security clause in the Company's contract with the Steelworkers; and to post appropriate notices (A. 9a-12a).

ARGUMENT

I. SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDINGS THAT THE COMPANY VIOLATED SECTION 8(a)(1), (2), AND (3) OF THE ACT BY RECOGNIZING THE STEELWORKERS AS THE EXCLUSIVE BARGAINING REPRESENTATIVE OF THE LITHOGRAPHIC PRODUCTION EMPLOYEES AT THE REGENCY PLANT, AND MAINTAINING AND ENFORCING AS TO THOSE EMPLOYEES A CONTRACT CONTAINING A UNION-SECURITY PROVISION, WHILE A REAL QUESTION CONCERNING THE REPRESENTATION OF THOSE EMPLOYEES EXISTED.

Under the doctrine of *Midwest Piping & Supply Co.*, 63 NLRB 1060 (1945), an employer faced with conflicting claims by rival unions which give rise to a real question concerning representation violates Section 8(a)(2) and (1) of the Act by recognizing or entering into a contract with one of the unions before the question concerning representation is resolved through Board processes. And when the employer, in the face of a real question concerning representation, not only recognizes one union but also executes a contract containing a union-security clause, it violates Section 8(a)(3) of the Act as well. *N.L.R.B. v. Hudson Berlind Corp.*, 494 F.2d 1200, 1203 (C.A. 2, 1974), cert. denied, 419 U.S. 897. The *Midwest Piping* doctrine has been repeatedly approved by this Court in a variety of factual settings. *Hudson Berlind, supra*, 494 F.2d at 1202, and cases cited therein. The evil of such recognition is that "once an employer has conferred recognition on a particular organization, it has a marked advantage over any other in securing the adherence of employees, and hence, in preventing the recognition of any other." *N.L.R.B. v. Pennsylvania Greyhound Lines, Inc.*, 303 U.S. 261, 267 (1938), enfg. 1 NLRB 1 (1935).

Whether a real question concerning the representation of the employees exists turns on the particular facts of each case. *Iowa Beef Packers v. N.L.R.B.*, 331 F.2d 176, 182 (C.A. 8, 1964); *Oil Transport Co. v. N.L.R.B.*, 440 F.2d 664, 665 (C.A. 5, 1971); *N.L.R.B. v. North Electric Co.*,

296 F.2d 137, 139 (C.A. 6, 1961). In order for a real question concerning representation to exist, it is not necessary for a union other than the one recognized by the employer to show that it is entitled to recognition. *N.L.R.B. v. Hudson Berlind Corp., supra*, 494 F.2d at 1202 n. 2. And particularly when faced with a demand for continued recognition by an incumbent union, an employer who recognizes one of two contending unions must show more than merely a reasonable basis for believing that the incumbent no longer enjoys majority status. For example, where an incumbent has a colorable contract claim to recognition which it is seeking to vindicate through litigation, the fact that a majority of employees has signed cards for another union does not obviate the existence of a bona fide question concerning representation or justify the employer's recognizing that other union as representative of the employees. See *N.L.R.B. v. Western Commercial Transport, Inc.*, 487 F.2d 332, 333-334 (C.A. 5, 1973). Similarly a change from a multi-employer to a single-employer bargaining unit, even where sufficient to justify withdrawal of recognition from an incumbent union, has been held insufficient to warrant recognition of another union. *N.L.R.B. v. Downtown Bakery Corp.*, 330 F.2d 921, 924, 927-28 (C.A. 6, 1964).

In the instant case, the ALA had a 30-year history of bargaining for lithographic employees in a separate unit at the Hudson plant. Long before it recognized the Steelworkers as the bargaining agent for lithographic employees at the Regency plant, the Company knew that most of the lithographic employees at the Hudson plant were interested both in continued employment at the Regency plant and in continued representation by the ALA at that plant. The Company further knew that the ALA not only desired to continue to represent such employees, but also claimed a right to do so under its collective bargaining agreement.

The work to be performed by lithographic employees at the Regency plant was basically the same kind of work previously done at the Hudson plant (though it involved only one of the plant's many product lines). The same machines were to be used, the same skills would be required, and many of the same supervisors would direct the work (A. 353a-355a). Moreover, the Company had invited employees from the Hudson plant to apply for employment at the Regency plant, and ultimately offered such employment to many employees. The 95 Hudson employees who ultimately accepted employment at the Regency plant constituted almost 40 percent of the total contemplated workforce there (A. 183a, 258a). The Company had no reasonable basis for believing, when it recognized the Steelworkers, that lithographic employees from the Hudson plant would not likewise constitute a substantial percentage of the lithographic employees ultimately hired at the Regency plant. It subsequently offered employment at the Regency plant to five such employees, and the plant manager admitted that others were qualified (A. 182a). Had the Company not conditioned employment of lithographers at the Regency plant on their willingness to accept the terms of the Steelworkers' contract, including its union-security clause, it is likely that a substantial number of the lithographers employed at the Regency plant would have been ALA adherents from the Hudson plant. Thus, while it was not certain, when the Company applied the Steelworkers' contract to lithographic employees at the Regency plant, that the ALA would ultimately represent a majority of those employees, the Company clearly had no grounds for believing that the ALA would not have a representative interest among such employees sufficient to create a question concerning representation. Certainly the Company could not assume, before hiring any lithographic employees at the Regency plant, that a majority of those ultimately hired would desire representation by the Steelworkers in an overall production unit; on the contrary, in view of the ALA's manifest interest and in view of the

history of separate lithographic units at the Company's three nearest plants (A. 260a), the Company had every reason to expect that the lithographic employees would wish to be separately represented.

The Company, however, admittedly did not want to have a separate unit of lithographers at its new plant, but rather desired that all the production employees be included in a single unit, if they were organized at all (*supra*, pp. 4, 6). Accordingly, notwithstanding its knowledge of the ALA's representational claims and its awareness of the appropriateness of a separate lithographic unit, the Company concealed its knowledge of the ALA's interest from the Board and joined with the Steelworkers in agreeing to an election at the new plant prior to the hiring of any lithographers. On the basis of this election, the Company thereafter applied the Steelworkers' union-security contract to the entire plant, including the subsequently hired lithographers. The consequence of this course of conduct was to shove the lithographic employees into the Steelworkers' Union without having had an opportunity to express their desires on the question of their representation. Cf. *Lianco Container Corp.*, 173 NLRB 1444 (1969); *Lianco Container Corp.*, 177 NLRB 907 (1969).

So far as the lithographic employees are concerned, the consequences of this course of conduct are precisely the same as those they would have suffered if the Company and the Steelworkers had entered into a pre-hire agreement of the sort that has long been forbidden by Section 8(a)(2) and (1) of the Act. See *N.L.R.B. v. Cen-Vi-Ro Pipe Corp.*, 457 F.2d 775, 776-77 (C.A. 9, 1972); *N.L.R.B. v. W.L. Rives Co.*, 328 F.2d 464, 468-69 (C.A. 5, 1964).

Nor is it decisive in the context of this case that a representative complement of employees in the production and maintenance unit may have been employed, and that the Steelworkers' majority status in that unit was clearly established by the Board election. For in cases arising

both in the container manufacturing industry and in other industries, the Board and the Courts have long recognized the appropriateness of a separate lithographic unit. See *N.L.R.B. v. Lord Baltimore Press,* 370 F.2d 397, 399-401 (C.A. 8, 1966); *N.L.R.B. v. Weyerhaeuser Co.*, 276 F.2d 865, 869-871 (C.A. 7, 1960), cert. denied, 364 U.S. 879; *Lianco Container Corp.*, 177 NLRB 907, 908 (1969); and cases cited at pp. 11-12 of the ALA's brief. Here, as shown, the ALA was actively seeking to represent lithographic employees at the Regency plant in a separate unit. In view of the history of separate lithographic units at the Company's three nearest plants and a number of its other plants throughout the nation (A. 260a), and in view of the fact that the lithographic employees at the Regency plant were to have the same special skills as those at the Hudson plant and perform the same functions, having no interchange with production employees included in the overall unit (A. 268a-269a), the Company had no reason to believe that the Board would not likewise approve the appropriateness of a separate unit here. In these circumstances, the Company's conduct was akin to that of employers who, in violation of Section 8(a)(2) and (1) of the Act, recognize the representative of an existing unit as the representative of a new facility which constitutes a separate appropriate unit – and in so doing, unnecessarily deprive the employees in the new unit of any opportunity to have a voice in the selection of their bargaining representative. See *N.L.R.B. v. Masters-Lake Success, Inc.*, 287 F.2d 35, 36 (C.A. 2, 1961); *Sheraton-Kauai Corp. v. N.L.R.B.*, 429 F.2d 1352, 1354-57 (C.A. 9, 1970).

The Company and the Steelworkers show no basis for concluding that a separate lithographic unit would be inappropriate here. However, the Company contends (Br. 20-26, 30-31) that the ALA could not raise the question of a separate unit for lithographic employees absent a showing of interest among such employees; that it could not make such a

showing of interest, since no lithographic employees were employed at the Regency plant; and that, accordingly, the Company and the Steelworkers were entitled to include the lithographers in the overall unit when they were hired. The Company's position would deny the lithographers the right to separate representation solely because an election was held in the overall unit before they were hired. Contrary to the Company's contention, Board policy does not require such an anomalous result. Instead, it requires that the decision on whether such employees are entitled to separate representation be made by the Board after they are hired, not, as was done here, by the employer and the union representing the overall unit before they are hired. The Board's decision in *Mrs. Tucker's Products,* 106 NLRB 533, 535-36 (1953), relied on by the Company, illustrates this policy. In that case, the Board declined to pass on the appropriateness of separate units of carpenters or maintenance employees, since the employer had not hired a representative complement of employees in either group. However, the Board specifically provided that the union seeking to represent the separate units was free to file petitions covering them once a representative complement of employees therein was hired. Indeed, when such a petition was subsequently filed by another union, the Board found that the maintenance employees could constitute a separate appropriate unit and vacated its prior decision insofar as that decision had ordered the inclusion of such employees in an overall unit. *Mrs. Tucker's Products,* 106 NLRB 1243 (1953). The same result might have occurred here, had the Company not precluded it by applying the Steelworkers' contract to the yet-to-be-hired lithographic employees.

Accordingly, it was unlawful for the Company to decide for itself the issues of the unit status and representation of the lithographic employees, by extending the Steelworkers' contract to them, instead of leaving these issues to the Board to determine. The course of action taken by the

Company was not necessary to protect the rights of other employees at the new plant; the Company could have recognized the Steelworkers as the representative of the production and maintenance employees, while declining to accord such recognition as to the lithographic employees until the Board determined whether they were entitled to a separate election. *Empire State Sugar Co. v. N.L.R.B.*, 401 F.2d 559, 563 (C.A. 2, 1968).

Nor can the Company's unlawful recognition of the Steelworkers as represenative of the lithographic employees be justified by reliance on the Board's certification of the Steelworkers as representative of the production and maintenance employees at the Regency plant. Even assuming that the certification covered lithographic employees, any contention that the Company acted in good faith herein is not persuasive in light of its failure to notify the Board's Regional Office of the ALA's interest in representing the lithographic employees at the Regency plant. The Board has held that, in circumstances such as those present herein, an employer "[has] a duty to inform the Regional Director of any claims to representation of which it [is] aware. It is for the Regional Director or the Board, and not the parties, to determine whether a claim has sufficient validity . . . to require that notice of the proceeding be given to the claimant and an opportunity be given to be placed on the ballot in any . . . election which may be held." *U.S. Chaircraft, Inc.*, 132 NLRB 922, 923 (1961).[5] Here the

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[5] The Company attempts (Br. 30) to distinguish *U.S. Chaircraft* as a case where the employer deliberately refrained from disclosing that a rival union had demanded recognition in an appropriate unit. Here, the ALA had demanded recognition in a unit of lithographic employees, and it was the Company's duty to disclose this to the Board and let the Board, not the Company, determine whether such a unit was appropriate. The Company not only failed to make such disclosure, but, as shown *infra*, falsely told the Board that it was unaware that such a demand for recognition had been made.

Company not only failed to fulfill this duty, but actively misled the Regional Office by falsely denying knowledge of the ALA's interest (A. 279a-282a). Clearly, the Company was thus acting to insure that its expressed preference for dealing with a single union at the new plant would be realized irrespective of the wishes of the lithographic employees. Under these circumstances, the Company cannot rely on the ALA's failure to do more to demonstrate the validity of its claim to represent the lithographic employees at the Regency plant. It did notify the Region of its interest in those employees and its objection to their inclusion in an overall unit. The Region's failure to act on this objection is attributable to its deception by the Company, rather than the failure of the ALA to show the validity of its claim. Cf. *Empire State Sugar Co. v. N.L.R.B., supra,* 401 F.2d at 561-562 (recognition on the basis of card check by third party unlawful where third party was not informed of cards signed on behalf of rival union).[6]

In addition, the record does not support an assertion that the certification covered lithographic employees. While the Steelworkers' petition specifically requested inclusion of lithographic employees in the production and maintenance unit, the unit that was certified was that described in the stipulation executed by the Company and the Steelworkers, and that unit description did not mention lithographic employees. There is no

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[6] The Company (Br. 27-28) and the Steelworkers (Br. 18-19) criticize the Board agent for failing to contact the Company's Greenwich office to determine whether the ALA had an interest in representing lithographic employees at the Regency plant. Such failure does not excuse the conduct of Ries, supervisor of employee relations at the Hudson plant, in telling the Board agent that he knew of no such interest when, as he later admitted (A. 281a), he had seen a letter (A. 333a-334a) which made such interest absolutely clear. Even if the Regional Office was negligent, the Board was entitled to correct its error and place the burden on the wrongdoing employer, rather than countenance a continued denial of employee rights. Cf. *N.L.R.B. v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 264-65 (1969).

basis for viewing this omission as meaningless, as it would be if the certification were considered applicable to lithographic employees.[7]

Moreover, even if the Company believed, in good faith, that the certification did apply to lithographic employees, its recognition of the Steelworkers as representative of those employees would be unlawful. "The act made unlawful by §8(a)(2) . . . cannot be excused by a showing of good faith" (*I.L.G.W.U. v. N.L.R.B.*, 366 U.S. 731, 739 (1961)), "for, even if mistakenly, the employees' rights have been invaded" (*Ibid.*).

II. SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDINGS THAT THE COMPANY DID NOT VIOLATE SECTION 8(a)(5) AND (1) OF THE ACT.

A. Refusal to recognize the ALA at the Regency plant.

As shown *supra*, the Company's recognition of the Steelworkers as exclusive represenative of the lithographic employees at the Regency plant violated Section 8(a)(2) and (1) of the Act. It does not follow, however, that the Company's refusal to recognize the ALA as the representative of

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[7] In its Decision and Order, the Board amended the certification issued to the Steelworkers at the Regency plant to make it clear that lithographic employees were not included therein (A. 13a). The Company contends (Br. 31-32) that the order amending the certification should be set aside. This order, however, is not properly before the Court. *Bonwit Teller, Inc. v. N.L.R.B.*, 197 F.2d 640, 642 fn. 1 (C.A. 2, 1952), cert. denied, 345 U.S. 905; *American Bread Co. v. N.L.R.B.*, 411 F.2d 147, 156 (C.A. 6, 1969).

The Company (Br. 29) and the Steelworkers (Br. 17) attack the Board's finding (A. 4a) as to the reason for the omission of lithographers from the unit description as unsupported by the record and seek to impugn the Board's integrity on the basis of this alleged error. Since the Administrative Law Judge made the same finding (A. 21a, lines 24-27), and no exceptions were filed thereto, the Board can hardly be faulted for adopting the finding. In any event, whatever the reason for the omission, neither the Company nor the Steelworkers offers any plausible grounds for ignoring it.

these employees was equally unlawful. The ALA contends that such recognition was required because the Regency plant was a relocation of the Hudson plant and, but for the Company's unlawful application of the Steelworkers' contract to the lithographic employees at the Regency plant, a majority of those employees would have been ALA members from the Hudson plant. We show below that the Board properly rejected these contentions.

At the Regency plant, the Company manufactured only one of the many products formerly manufactured at the Hudson plant (A. 186a, 207a-208a), using only some of the machinery from the Hudson plant (A. 260a-261a) and a work force far smaller than that at the Hudson plant (A. 212a, 258a), including only 26 of the 98 supervisors from that plant (A. 353a-355a). Under these circumstances, the Board was warranted in finding the Regency plant to be a completely new plant, rather than a continuation of the Hudson plant at a new location. Similarly, since lithographic production at the Regency plant involved only one product line, only half as many employees as at the Hudson plant, and only some of the machinery used at the Hudson plant, the Board properly declined to treat it as simply a continuation of the lithographic production process formerly carried on at the Hudson plant. Accordingly, since the Regency plant was not a continuation of the Hudson plant, the ALA's representative status at the latter did not automatically carry over to the former. *N.L.R.B. v. Hudson Berlind Corp., supra,* 494 F.2d at 1203.

Moreover, the record herein does not require a conclusion that it was clear that a majority of the lithographic employees at the Regency plant would be ALA members from the Hudson plant. That the lithographic employees at the Hudson plant had indicated an interest in employment at the Regency plant does not necessarily show that they would have accepted an offer of such employment; less than half of the production

employees from the Hudson plant who were offered employment at the Regency plant accepted it. The lithographic employees' expression of interest in employment at the Regency plant may have been based on the assumption that they would continue to be covered by the ALA contract and received all the benefits provided therein. However, the contract had no provision making it applicable to new plants, and the Company was not required to apply it to such plants or to offer employees there the same benefits they had received at the Hudson plant. *Cooper Thermometer Co. v. N.L.R.B.*, 376 F.2d 684, 688 (C.A. 2, 1967); *N.L.R.B. v. Die Supply Corp.*, 393 F.2d 462, 465 (C.A. 1, 1968); *Fraser & Johnston Co. v. N.L.R.B.*, 469 F.2d 1259, 1264-65 (C.A. 9, 1972). The distance between the old and new plants was essentially the same as that in *Cooper Thermometer, supra*, 376 F.2d at 688-689, fns. 6, 8, and here, as in *Cooper Thermometer*, there is no evidence that the employees were prepared to take the time and expense of reaching the Regency plant every day to receive reduced benefits. Indeed, the only five ALA members who were offered employment at the Regency plant declined it, and the Board did not disturb the Administrative Law Judge's finding (A. 23a) that their refusal was based at least in part on the loss of benefits they would suffer, rather than solely on the unlawful application of the Steelworkers' contract to them. Accordingiy, it is not clear that, absent the Company's unfair labor practices, a majority of the lithographic employees at the Regency plant would have been ALA supporters.[8] See *Fraser & Johnston Co. v. N.L.R.B., supra*, 469 F.2d at

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[8] The ALA contends (Br. 13-14) that the Company engaged in additional unfair labor practices, *i.e.*, dealing individually with employees concerning employment at the Regency plant and discriminating against ALA members in hiring at that plant. These violations were neither alleged in the complaint, litigated at the hearing, nor found by the Board. Accordingly, they cannot be raised here. Cf. *N.L.R.B. v. Majestic Weaving Co.*, 355 F.2d 854, 861-62 (C.A. 2, 1966).

1265. Absent a showing that the ALA would have retained its majority status at the Regency plant, the Company was not required to recognize it there. *UAW v. N.L.R.B.*, 394 F.2d 757, 762-63 (C.A.D.C., 1968), cert. denied, 393 U.S. 831; *Cooper Thermomter, supra; Fraser & Johnston, supra.* Accordingly, the Company's obligation herein was not to recognize the ALA as the representative of the lithographic employees at the Regency plant, but to refrain from recognizing anyone as their representative until the question concerning their representation was resolved.

B. Refusal to bargain concerning effects of closing of Hudson plant on lithographic employees.

Although the complaint in this case did not specifically allege that the Company unlawfully refused to bargain with the ALA concerning the effects of the closing of the Hudson plant on the lithographic employees there, this issue was litigated before the Board, on the theory that, but for such refusal to bargain, the ALA would have achieved majority status among the lithographic employees at the Regency plant. As we show below, the Board properly concluded (A. 33a-35a) that there was no unlawful refusal to bargain concerning the effects of the shutdown, since the ALA waived its right to bargain on this matter.

While the Company did not formally notify the ALA of its intention to close the Hudson plant and open the Regency plant, it made no attempt to conceal its plans. All of its employees, including those represented by the ALA, were informed of the decision to close the Hudson plant in August 1972, and of the decision to open the Regency plant in December 1972. The ALA was admittedly aware of both decisions by the end of December (A. 92a). The Regency plant did not open until several months later, and did not hire its first lithographic employees until about a year later, and the Hudson plant was still open almost a year

and a half later. Thus, the ALA had ample time to request bargaining over the effects of the shutdown on the employees it represented, and on the terms under which they might be employed at the Regency plant. It consistently demanded recognition as representative of the lithographic employees at the Regency plant, and also demanded employment, at the Regency plant, of all lithographic employees from the Hudson plant who requested such employment, but until May 1974, it did not otherwise request bargaining on the effects of the shutdown. While it demanded that its members from the Hudson plant be transferred to the Regency plant, it did not offer alternative suggestions, or request that possible alternatives be discussed, when the Company rejected this demand. Indeed, it negotiated a new contract with the Company without attempting to have included therein provisions relating to the effects of the shutdown of the Hudson plant on the unit employees (A. 102a, 108a-109a).

Further, contrary to the ALA's contention (Br. 19-20), the Company never asserted that it was not obligated to bargain about transferring employees from the Hudson plant to the Regency plant. It only took the position that it was not obliged to agree to transfer all lithographic employees who desired employment at the new plant, as the ALA was demanding. In this, the Company was clearly correct; it was not required to accept whatever proposals that ALA might present, but only to discuss them. The Company never refused to do this; in fact, its letter on March 9, 1973 (A. 335a, pars. 2, 5) clearly indicated that it would discuss any such proposals and implied that the forthcoming negotiations for a new contract covering the Hudson plant would be an appropriate occasion for doing so. Moreover, when the ALA finally did specifically request bargaining concerning the effects of the shutdown on unit employees, the Company agreed to bargain (A. 352a).

Under these circumstances, we submit, the Board was warranted in concluding that the ALA had waived its right to bargain about the effects of the plant closing on the lithographic employees. See *N.L.R.B. v. Spun-Jee Corp.*, 385 F.2d 379, 383-384 (C.A. 2, 1967); *U.S. Lingerie Corp.*, 170 NLRB 750, 751-752 (1968). Consequently, there is no basis for concluding that the Company failed to fulfill its bargaining obligation with respect to the effects of the closing of the Hudson plant, and a finding that the Company was obligated to bargain with the ALA at the Regency plant cannot be predicated on the theory that an unlawful refusal to bargain at the Hudson plant prevented the ALA from achieving majority status at the Regency plant.[9]

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[9] Even where there is an unlawful refusal to bargain about the effects of a plant shutdown or relocation, as in *Cooper Thermometer, supra*, and *Fraser & Johnston, supra*, courts have declined to find an unlawful refusal to bargain at a new location, absent a showing that bargaining concerning the effects of the shutdown or relocation would have resulted in an agreement on terms which would have led a majority of the unit employees to accept employment at the new location. As indicated *supra*, pp. 20-21, no such showing has been made here.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petitions for review should be denied and the Board's order enforced in full.

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

AMERICAN CAN COMPANY, Petitioner, and UNITED STEELWORKERS OF AMERICA, AFL-CIO, Intervenor, v. NATIONAL LABOR RELATIONS BOARD, Respondent.	)	No. 75-4126

CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the Board's offset printed brief in the above-captioned case have this day been served by first class mail upon the following counsel at the addresses listed below:

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Dated at Washington, D.C.

this 9th day of January, 1976.